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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 160

RICHARD SMITH AND GERALDINE J. HALL,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the Court of Appeals (R. 137–141) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered May 18, 1940 (R. 141). The petition for writ of certiorari was filed June 17, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court erred in admitting as evidence certain lottery papers alleged to have been illegally obtained from the person and automobile of the petitioner Smith at the time of his arrest.

2. Whether it was reversible error to excuse from the jury panel six persons who admitted that they had played the numbers game, petitioners being charged with violations of the lottery laws of the District of Columbia.

3. Whether the admission in evidence of a statement by a Government witness that petitioner Smith was known as a "fast driver" constituted prejudicial error.

4. Whether reversible error resulted from certain instructions to the jury.

STATUTES INVOLVED

The pertinent statutory provisions appear in the Appendix to the brief in support of the petition for writ of certiorari (pp. 32–33).

STATEMENT

Petitioners were convicted upon counts 9, 10, 11 and 12 of an indictment charging violations of the lottery laws of the District of Columbia and conspiracy to violate those laws (R. 9–15). The petitioner Smith was sentenced to imprisonment for a period of six months to two years on each of counts 9 and 10, six months on count 11, and four months to two years on count 12, the sentences

to run concurrently (R. 15–16). The petitioner Hall was sentenced to imprisonment for a period of four to ten months on each of counts 9 and 10, four months on count 11, and four to ten months on count 12, the sentences to run concurrently (R. 16). On appeal to the Court of Appeals for the District of Columbia petitioners' judgments of conviction were unanimously affirmed (R. 137–141).

The evidence establishing the guilt of the petitioners and the circumstances surrounding the arrest of the petitioner Smith and the seizure of certain lottery papers found on his person and in his automobile at that time, is sufficiently summarized in the opinion of the Court of Appeals (R. 138–139).

ARGUMENT

I

As a basis for urging the exclusion as evidence of certain lottery papers seized by police officers from the possession of the petitioner Smith at the time of his arrest, his counsel at the trial moved to quash the warrant of arrest on the ground that it was issued without probable cause (R. 61–63), but action on this motion was held in abeyance (R. 64). No motion to suppress the evidence had been made prior to trial. At the conclusion of the defendants' case the motion to quash was renewed (R. 96–102), but the trial court overruled it upon the authority of the recent decision of the Court of

Appeals for the District of Columbia in *Bennett* v. *United States,* 104 F. (2d) 209 (R. 102–105).[1] In that case it was held that an objection to evidence alleged to have been illegally seized comes too late when first made during the course of a criminal trial, if there has been an opportunity to present the matter prior to trial.

This is but a recognition of the principle applied by this Court in *Segurola* v. *United States,* 275 U. S. 106, 111–112, which principle, the Court stated, was first laid down by it in *Adams* v. *New York,* 192 U. S. 585, and reiterated by it in subsequent decisions. See also *Nardone* v. *United States,* 308 U. S. 338, 342. The *ratio decidendi* of these decisions is that a court should not pause in the course of a criminal trial to determine collateral issues as to how the evidence was obtained.

It is contended, however, in reliance upon *Gouled* v. *United States,* 255 U. S. 298, and *Agnello* v. *United States,* 269 U. S. 20, that this principle does not apply where the uncontroverted evidence discloses a search and seizure in violation of the Fourth Amendment (Br. 12–17). And it is asserted (Br. 17–22) that the undisputed evidence in the instant case established that there was no probable cause for the issuance of the warrant of arrest for petitioner Smith and that there were not suffi-

[1] The record does not disclose that any exception was taken to the overruling of this motion. Since, however, the action of the trial judge was reviewed by the Court of Appeals (R. 139), we have discussed it here.

cient facts and information in the possession of the arresting officers to justify their arrest of petitioner Smith without a warrant.[2]

We submit that neither the *Gouled* case nor the *Agnello* case presents a comparable situation. In the *Gouled* case, which was before this Court upon certificate, there had been a motion before trial for the return of the seized papers, and the certificate disclosed that it had become apparent during the course of the trial that the papers had been unconstitutionally seized.

In the *Agnello* case it was undisputed that a defendant against whom the Government sought to introduce a certain can of cocaine did not know of the search of his premises and the seizure of the cocaine until the Government sought to introduce it at the trial. Also, it appeared from facts not in controversy that the search and seizure were in violation of the Fourth Amendment.

In the instant case, however, the lottery papers were seized from the person and automobile of the petitioner Smith at the time of his arrest, long prior to the trial (R. 67–68, 72); accordingly, it cannot be said that he was not aware of the search and

[2] It is not at all clear from the petition for writ of certiorari and supporting brief whether this question is being urged on behalf of both petitioners or merely on behalf of the petitioner Smith. Since only his constitutional rights were transgressed if the search and seizure were invalid, it would seem that the petitioner Hall is not in a position to urge the question. See *Agnello* v. *United States*, 269 U. S. 20, 30, *supra*.

seizure until the Government sought to introduce the lottery papers at the trial.

Nor can it properly be argued that the undisputed facts showed that the search and seizure were in violation of the Fourth Amendment. In view of the ruling of the trial court that the issue should have been raised in advance of trial by a motion to suppress (R. 102–105), the question was but meagerly explored. From what is contained in the record it is evident that there was a dispute as to whether the officer who obtained the warrant of arrest made an affidavit before the United States Commissioner in addition to that upon which the petitioners rely (R. 56–57, 98). Also, as is apparent from the summary of the testimony contained in the opinion of the Court of Appeals (R. 138–139), it cannot be said that the undisputed facts disclose that the arresting officers lacked sufficient facts and information to justify their arrest of petitioner Smith without a warrant. Indeed, the trial judge, upon the basis of the evidence before him, stated that, "I am not clear that the warrant is not valid as it stands" and that "I am inclined to think, also, that the officers had sufficient knowledge to arrest" petitioner Smith without a warrant (R. 105).

In reliance upon the decision of the Court of Appeals upon petition for rehearing in *Bennett* v. *United States,* 104 F. (2d) 209, it is contended (Br. 22) that permission should have been granted

at the trial to raise the question of the legality of the search and seizure, even though no motion to suppress was made in advance of trial. In the *Bennett* case it was conceded by the Government (apparently in response to the petition for rehearing) that the defendant who sought to challenge the admissibility of the evidence there in controversy had been precluded by the established practice of the trial judge from raising the question before trial. In the instant case, however, the trial court made it clear that if a motion to suppress had been filed before trial it would have heard it (R. 102, 104).

It is true, as the petitioners assert, that the trial judge in the instant case, in view of the original decision in the *Bennett* case,[3] abandoned his former practice of permitting the filing of motions to suppress evidence to be delayed until the trial, but this abandonment had been foreshadowed when the *Bennett* decision was rendered on February 27, 1939, three months in advance of the trial in the present case. There was, consequently, ample opportunity prior to the trial of the instant case to present a motion to suppress the evidence in question.

Since all of the trial judges in the District presumably conformed their practice to the ruling of the Court of Appeals in the *Bennett* case, it cannot matter that some of the trial judges may have

[3] See p. 4, *supra*.

theretofore followed a practice which varied from that of the judge who presided at the trial of the instant case, as petitioner would seem to infer (Br. 22). In any event, the burden is upon him who seeks at the trial to attack the legality of a search and seizure to establish that he has been denied an opportunity to present the question in advance of trial, and there has been, we submit, no such showing made in the instant case.

II

In the examination of the prospective jurors the trial judge, at the request of the Government, inquired whether any of them had played the so-called numbers game within the past two years. Six of the prospective jurors answered in the affirmative and were excused for cause (R. 25). Petitioners contend, in effect, that this action of the trial court constituted prejudicial error because it resulted in the Government being permitted to exercise more peremptory challenges than is allowed by statute.

The record does not disclose that any exception was taken by the petitioners. But, aside from this, we submit that there is no merit in their contention. The petitioners do not assert that the jury finally selected was prejudiced against them or did not try the issues fairly. The right of a defendant, in the selection of the trial jury, is to secure the rejection of those who are apparently prejudiced against him, not to obtain a jury preju-

diced in his behalf. *Kloss* v. *United States,* 77 F. (2d) 462, 463 (C. C. A. 8th). All that a defendant is entitled to is a duly qualified and impartial jury. *Crawford* v. *United States,* 212 U. S. 183, 196. In the selection of the jury the trial judge has, of course, a wide discretion. *Reynolds* v. *United States,* 98 U. S. 145; *Fall* v. *United States,* 49 F. (2d) 506 (App. D. C.), certiorari denied, 283 U. S. 867. The petitioners having had a fair trial by an impartial jury, their legal rights were protected and the exclusion from the jury of persons who had previously played the numbers game could not in any wise have prejudiced them. See *Ruthenberg* v. *United States,* 245 U. S. 480.

Since violations of the lottery laws were the offenses involved, the Court of Appeals was clearly correct in stating that "it was well within the judicial discretion of the judge to excuse prospective jurors on the ground stated" (R. 139).

The cases relied upon by the petitioners deal largely with the acceptance of jurors over a defendant's challenge for cause, and, consequently, are not in point. Those cases which they cite relating to the impact of the equal-protection clause upon the exclusion by state authorities of negroes from jury panels obviously present no analogy. Here, the prospective jurors were excluded for *cause.*

III

It is next contended (Br. 27–28) that reversible error resulted because one of the police officers

who arrested the petitioner Smith was, on redirect examination by the Government, permitted to state that the reason an automobile assigned to one Sweeney, an Alcohol Tax Unit investigator, was used in following Smith was because that automobile was in a little better shape than the one the police officers had and because "we knew, by reputation, that the defendant Smith was a right fast driver" (R. 88). It is argued that fast driving implies reckless driving, which is a crime, and hence that the Government was improperly permitted to attack the character, reputation, and habits of the petitioner Smith prior to his putting the same in issue.

The mere statement of the contention discloses its lack of merit. Aside from the fact that fast driving does not necessarily imply reckless driving, clearly the answer of the witness was not intended to impute to the petitioner Smith a bad reputation or character. The record discloses that the prosecutor was seeking merely to show that Sweeney, although an Alcohol Tax Unit investigator, was present at Smith's arrest solely because his automobile was being used by the officers. The court below, we submit, properly included the above contention among those which it declined to discuss as being "without merit" (R. 141).

IV

(a). In charging the jury, the trial court stated (R. 117):

> Now, the defendants have not testified in this case. That is entirely their right, under the Constitution. A person may testify or not, as he pleases, in a criminal case. If he does not testify, you must not draw any presumption or unfavorable inference against him or her because he has merely availed himself of his Constitutional right.

Petitioners contend (Br. 29) that prejudicial error resulted because this instruction conveyed to the minds of the jury that the petitioners, in not testifying, were hiding behind a Constitutional right, whereas their privilege not to take the stand was a statutory one.

The contention is, we submit, too trivial to require argument. Moreover, it should be pointed out that no specific objection or exception was taken to the instruction by the petitioners (R. 113, 135). Nor did they assign the giving of it as error (R. 18–20).

(b). The petitioners also assert (Br. 29–30) that they were prejudiced by certain other instructions of the trial court with reference to the unexplained possession of lottery papers and slips (R. 123–124). Their contention is, in effect, that these instructions reflected upon their failure to testify. It is apparent from the summary of the evidence contained in the opinion below (R. 138–139) that the jury was justified in concluding that the lottery papers and slips found in the possession of petitioner Smith at the time of his arrest had also previously been in

the possession of the petitioner Hall. The instructions were consequently required by the provision of the lottery statutes to the effect that the possession of lottery papers shall be *prima facie* evidence of certain offenses under that statute (Appendix to petitioners' brief, pp. 32–33), offenses which were charged in the indictment (R. 6–15). The instructions contain nothing which in any way called the jury's attention to the fact that the petitioner had not taken the stand. Indeed, as the court below said, "A full reading of the court's charge shows that it was even more favorable to all the accused than they had a right to demand" (R. 141). Furthermore, here again the petitioners neither objected nor excepted to the instructions in question, nor did they assign the giving of them as error.

CONCLUSION

The petition presents no question requiring review by this Court, and we therefore respectfully submit that it should be denied.

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JULY 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940